Muhammad Lukman bin Mohamad v Public Prosecutor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05(M)-300–12 OF 2019(B)
TENGKU MAIMUN CHIEF JUSTICE, ZAWAWI SALLEH AND HARMINDAR SINGH FCJJ
21 JUNE 2021

Criminal Law — Dangerous drugs — Trafficking — Whether prosecution had to establish net weight of impugned drug in order to establish drug trafficking charge in respect of same under s 39B(1)(a) of Dangerous Drugs Act 1952 ('the DDA') — Whether weight/quantity of impugned drug was essential ingredient of a drug-trafficking charge — Whether prosecution's failure to prove weight/quantity of impugned drug could not result in a drug-trafficking conviction — Whether proof of possession and trafficking as defined under the DDA were by themselves insufficient to secure a drug-trafficking conviction if amount/quantity of impugned drug involved had also not been proven

The appellant was charged in the High Court with three charges of trafficking in, respectively, 3,010ml of Delta-9-Tetrahydrocannabinol ('THC'), 1422g of THC and 279.81g of cannabis — all of which drugs were recovered by a police party when they raided a house occupied by the appellant. All three charges were made under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') which carried the death penalty upon conviction. The appellant admitted knowing that the THC, which was in the form of oil, contained cannabis but asserted that it was used for medicinal purposes to treat various ailments and that he sold the oil online to parties interested in buying them. The appellant said that other than the THC oil, he had no knowledge of cannabis and cannabis-smoking equipment that the police allegedly found in the house. To support his claim that the 'cannabis oil' had medicinal properties, the appellant called one of his 'patients' as a witness and also a university lecturer to testify to its health benefits. Although the investigating officer of the case had sent the seized THC exhibits to the chemist ('SP6') for analysis to determine the type and net weight of the drug, SP6 testified that he did not do any quantitative analysis to determine the weight because he felt 'there was no need or requirement' to do so. Following a trial, the High Court found the three charges proven and convicted and sentenced the appellant to death. On the appellant's appeal, the Court of Appeal ('COA') set aside the conviction and sentence on the charge of trafficking in the 279.81g of cannabis, convicted the appellant on a reduced charge of possession of the same and sentenced him to seven years' jail and ten strokes of the rotan. The COA dismissed the appeal in respect of the two THC charges holding that: (a) SP6's failure to do any quantitative analysis of the THC was not fatal or an issue because THC was

A listed under the First Schedule, Part III of the DDA and the law did not require its actual weight to be stated in a trafficking charge; (b) there was no stipulation as to the weight of THC in either s37(da) or s 39A(2) of the DDA; in other words, even possession of 0.01ml of THC was sufficient to attract an offence under the DDA; (c) since the trial court had found the appellant in custody and
B control of the THC, and thereby in 'possession' of the same, and he was also found to have engaged in the 'manufacturing' of the drug, the definition of trafficking under s 2 of the DDA had been satisfied and therefore the amount or quantity of THC involved was irrelevant and the court was entitled to convict the appellant for trafficking; and (d) as the appellant was not legally
C authorised to possess, manufacture, process or sell the THC and in the absence of compelling evidence to show that the drug had medicinal properties, the appellant's mere assertion of its health benefits had no merit. In the instant appeal against the convictions and sentences in respect of the two THC
D charges, the appellant asked the Federal Court to rule that: (i) in order to establish a drug trafficking charge under s 39B(1)(a) of the DDA, it was incumbent upon the prosecution to establish the net weight of the impugned drug/drugs; (ii) since the amount/quantity of dangerous drugs involved in the charges against him were not quantified or scientifically determined, he ought
E to have been convicted under s 9 of the DDA and not for trafficking; and (iii) the drugs stated in the THC charges were medicinal cannabis and did not come within the ambit of the DDA.

Held, unanimously setting aside the trafficking convictions and sentences on
F the THC charges and replacing them with convictions for the offence of possession under s 9 of the DDA and sentencing the appellant to five years' jail on each of the two charges with effect from his date of arrest; both sentences to run concurrently:

G (1) The appellant could not be convicted for drug trafficking where the amount or quantity of the dangerous drugs stated in the charges were not quantified or scientifically determined. The amount/quantity of the dangerous drugs specified in the THC charges was an essential part of the alleged offences. In the circumstances, the court agreed with the
H appellant's alternative submission that, at its highest, he ought to be convicted under s 9 of the DDA (see paras 28 & 35–34).

(2) Where the stakes were high (death penalty), some precision was called for. Without quantitative analysis of the impugned drugs carried out by
I SP6 and with no other evidence as to the amount or quantity of the impugned drugs on the record to justify the amount or quantity of THC stated in the first and second charges, the prosecution had failed to establish its case against the appellant beyond reasonable doubt (see para 33).

(3) The weight or quantity of impugned drugs was an important and essential ingredient of the charge. It represented the core of the prosecution's case. The appellant could not be penalised for the omission or failure of the chemist to carry out the quantitative analysis. The court could not comprehend why SP6 did not do any quantitative analysis to confirm the weight or quantity of the dangerous drugs. The evidence showed that the investigating officer had requested the chemist to determine the nature and net weight of the impugned drugs. In his testimony, SP6 did not say that quantitative analysis could not be done. In fact, he said he did not do so (see paras 29–30).

(4) The courts below correctly held that the appellant's conduct came within the ambit of the DDA since he was not authorised to possess, manufacture, handle, process or sell the impugned drugs for medicinal purposes. As the law currently stood, cannabis was a controlled drug under the First Schedule of the DDA and the government's policy stance was to maintain the current status on cannabis and all drug-related substances as provided in the DDA. The Minister concerned had not, under the DDA, authorised the cultivation of cannabis for medicinal purposes, nor had substantial research been done in Malaysia to show that cannabis oil could cure ailments (see paras 41 & 43–45).

(5) This court did not agree with the COA's view that since the prosecution had proven the elements of possession and trafficking against the appellant, the amount/quantity of the THC was irrelevant and the trial court was entitled to convict the appellant on the trafficking charges. This was because of the following reasons: (a) it was apparent from the scope and scheme of the DDA that the Legislature had intended to differentiate between traffickers and mere addicts. The DDA provided for much less severe penalties for offences of consumption and possession as compared with punishments for trafficking; (b) generally, the amount or quantity of dangerous drugs had a bearing on the sentencing process and was one of the important factors taken into consideration by the prosecution in deciding whether an accused should be charged for trafficking or possession simpliciter. The quantity of impugned drugs would bring into play the presumption of trafficking under s 37(da) of the DDA; (c) the weight or quantity of the impugned drugs was an important and essential ingredient of the charge and represented the core of the prosecution's case. The burden was on the prosecution to prove beyond reasonable doubt every essential fact necessary to establish the charge against the accused; (d) in all prosecutions for drug trafficking, the corpus delict was the dangerous drug itself, the existence of which was essential to a judgment of conviction. Because of the seriousness of the penalty, the certainty of the amount/quantity of the impugned drug was very important and formed an essential part of the charge. Dangerous drugs were not readily identifiable. To determine their composition and nature,

they had to undergo scientific testing and analysis. Dangerous drugs were also highly susceptible to alteration, tampering or contamination. Therefore, a quantitative analysis was essential; and (e) it was a fundamental principle of our criminal law that an accused should know with certainty the case mounted against him by the prosecution, especially the amount/quantity of impugned drugs in a trafficking charge (see paras 25–32).

[Bahasa Malaysia summary

Perayu dituduh di mahkamah tinggi dengan tiga pertuduhan pengedaran, iaitu, 3,010ml Delta-9-Tetrahydrocannabinol (THC), 1422g THC dan 279g kanabis — semua yang mana dadah telah ditemui oleh pihak polis apabila mereka menyerbu satu rumah yang didiami oleh perayu. Kesemua pertuduhan dibuat dibawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') yang membawa hukuman mati sekiranya disabit kesalahan. Perayu mengaku mengetahui bahwa THC, yang berada dalam bentuk minyak, mengandungi kanabis tetapi mengatakan bahawa ianya digunakan untuk tujuan perubatan untuk merawat pelbagai penyakit dan bahawa dia menjual minyak tersebut di atas talian kepada pihak yang berminat untuk membelinya. Perayu mengatakan bahawa selain minyak THC tersebut, dia tiada pengetahuan mengenai kanabis peralatan menghisap kanabis yang polis kononnya temui dalam rumah tersebut. Untuk menyokong tuntutan bahawa minyak kanabis mempunyai sifat perubatan, perayu memanggil salah seorang pesakitnya sebagai saksi dan juga seorang pensyarah universiti untuk memberi keterangan mengenai kepentingan kesihatannya. Walaupun pegawai penyiasat kes telah menghantar ekshibit THC yang dirampas kepada ahli kimia ('SP6') untuk dijalankan analisa dan menentukan jenis dan berat bersih dadah, SP6 memberi keterangan bahawa dua tidak menjalankan apa-apa analisa kuantitatif untuk menentukan berat kerana dia berpendapat tiada keperluan untuk berbuat sedemikian. Selepas perbicaraan, mahkamah tinggi mendapati ketiga-tiga pertuduhan telah dibuktikan dan mensabitkan dan menjatuhkan hukuman mati keatas perayu. Atas rayuan perayu, Mahkamah Rayuan ('MR') telah mengenepikan sabitan dan hukuman atas pengedaran dadah dalam 279.81g kanabis, mensabitkan perayu atas pertuduhan milikan yang dikurangkan dan mensabitkan dengan tujuh tahun pemenjaraan, dan sepuluh sebatan rotan. MR mengenepikan rayuan berkaitan dengan dua pertuduhan THC dan memutuskan bahawa: (a) kegagalan SP6 untuk membuat apa-apa analisa kuantitatif adalah tidak fatal atau menjadi satu isu kerana THC tidak disenaraikan dibawah Jadual Pertama, Bahagian III ADB dan undang-undang tidak memerlukan berat sebenar dinyatakan dalam satu pertuduhan pengedaran; (b) tiada penetapan berkaitan dengan berat THC sama ada di dalam s 39(da) atau s 39A(2) ADB; dalam erti kata lain, walaupun pemilikan 0.01ml THC adalah memadai untuk mengundang satu kesalahan sama ada dibawah ADB; (c) memandang mahkamah bicara mendapati bahawa perayu mempunyai milikan dan kawalan THC, dan oleh yang demikian

'memiliki'-nya, dia juga didapati telah terlibat dengan pembuatan dadah tersebut, tafsiran pengedaran dibawah s 2 ADB telah dipenuhi dan oleh yang demikian jumlah atau kuantiti THC yang terlibat adalah tidak relevan dan mahkamah berhak untuk mensabitkan perayu untuk pengedaran; dan (d) kerana perayu tidak diberikuasa di sisi undang-undang untuk memiliki, membuat, memproses atau menjual THC dan dalam ketiadaan keterangan untuk menunjukkan bahawa dadah tersebut mempunyai kesan perubatan, pengataan kosong perayu akan manfaat kesihatannya tiada merit. Dalam rayuan ini, terhadap sabitan dan hukuman berkaitan dengan dua pertuduhan THC, perayu telah memohon agar Mahkamah Persekutuan untuk membuat dapatan bahawa: (i) untuk membuktikan pertuduhan pengedaran dibawah s 39B(1)(a) ADB, adalah penting untuk pihak pendakwaan membuktikan berat bersih dadah; (ii) sejak amaun/kuantiti dadah berkaitan dalam pertuduhan terhadapnya tidak di tentukan secara saintifik atau dikiri, dia sepatutunya disabitkan dibawah s 9 ADB dan bukannya untuk pengedaran; dan (iii) dadah yang dinyatakan dalam pertuduhann THC adalah kanabis untuk tujuan perubatan dan tidak jatuh dibawah ADB.

Diputuskan, sebulat suara mengenepikan sabitan dan hukuman pertuduhan THC dan menggantikan mereka dengan sabitan untuk kesalahan pemilikan dibawah s 9 ADB dan menghukum perayu dengan lima tahun pemenjaraan atas setiap satu pertuduhan bermula dari tarikh tangkap dan kedua-dua hukuman untuk berjalan secara selari:

(1) Perayu tidak boleh disabitkan untuk pengedaran dadah di mana amaun atau kuantiti dadah berbajaya yang dinyatakan didalam pertuduhan tidak di kira atay ditentukan secara saintifik. Amaun atau kuantiti dadah berbahaya yang dinyatakan dalam pertuduhan THC adalah sebahagian penting kesalahan yang dikatakan dilakukan. Dalam keadaan ini, mahkamah bersetuju dengan hujahan alternatif perayu, bahawa pada peringkat tertinggi sekalipun, dia sepatutunya disabitkan dibawah s 9 ADB (lihat perenggan 28 & 34–35).

(2) Apabila perkara yang ditaruhkan adalah tinggi (hukuman mati) adalah penting untuk mempunyai ketepatan. Tanpa analisa kuantitatif dadah dijalankan oleh SP6 dan dalam ketiadaan lain keterangan berkaitan dengan jumlah atau kuantiti dadah di dalam rekod untuk memberi alasan menyokong amaun atau kuantiti THC dinyatakan dalam pertuduhan pertama dan kedua, pendakwaan gagal untuk membuktikan kesnya terhadap perayu melampaui keraguan munasabah (lihat perenggan 33).

(3) Berat atau kuantiti dadah adalah penting dan merupakan inti pati penting pertuduhan. Ianya mewakili asas kes pendakwaan. Perayu tidak boleh dihukum atas kegagalan ahli kimia untuk menjalankan analisa kuantitatif. Mahkamah tidak dapat memahami mengapa SP6 tidak

menjalankan analisa kuantitatif untuk mengesahkan berat atau kuantiti dadah berbahaya. Keterangan menunjukkan bahawa pegawai penyiasat telah memohon ahli kimia untuk menentukan sifat dan berat bersih dadah tersebut. Dalam keterangannya SP6 tidak menyatakan analisa kuantitatif tidak boleh dilakukan. Sebaliknya, dia menyatakan dia tidak berbuat sedemikian (lihat perenggan 29–30)

(4) Mahkamah terdahulu betul apabila mendapati bahawa perlakuan perayu terjumlah dibawah bidang kuasa ADB kerana dia tidak diberkuasa untuk memiliki, membuat, mengendalikan, memproses atau menjual dadah untuk tujuan perubatan. Undang-undang pada waktu ini, kanabis merupakan satu dadah terkawal dibawah Jadual pertama ADB dan adalah merupakan polisi kerajaan untuk mengekalkan status kanabis dan semua bahan berkaitan dadah sepertimana yang diperuntukan dibawah ADB. Menteri yang berkaintan belum, dibawah ADB, membenarkan penanaman kanabis untuk tujuan perubatan, dan juga tiada penyelidikan yang mendalam dilakukan di Malaysia untuk menunjukkan bahawa minyak kanabis boleh memulihkan penyakit (lihat perenggan 41 & 43–45).

(5) Mahkamah ini tidak dapat bersetuju dengan pandangan MR yang sejak pendakwaaan telah membuktikan kesemua elemen milikan dan pengedaran terhadap perayu, jumlah/kuantiti THC adalah tidak relevan dan mahkamah bicara berhak untuk mensabitkan perayu atas pertuduhan pengedaran. Ini adalah kerana sebab berikut: (a) adalah jelas daripada skop dan skim ADB bahawa badan perundangan berniat untuk membezakan antara pengedar dan penagih. ADB memperuntukan hukuman kurang berat untuk kesalahan memasukkan kedalam diri sendiri dan milikan apabila dibandingkan dengan hukuman untuk pengedaran; (b) secara amnya, berat atau kuantiti dadah mempunyai kesan atas proses menjatuhkan hukuman dan merupakan satu faktor penting untuk dipertimbangkan oleh pendakwaan dlaam memutuskan sama ada seorang tertuduh sepatutnya dipertuduhkan untuk pengedaran atau milikan. Kuantiti dadah akan membawa masuk penggunaan pengedaran dibawah s 37(da) ADB; (c) berat atau kuantiti dadah berbahaya adalah penting dan merupakan inti pati penting pertuduhan dan merupakan asas kes pendakwaan. Beban adalah pada pihak pendakwaan untuk membuktikan melampaui keraguan munasabah semua fakta penting yang perlu untuk membuktikan pertuduhan terhadap tertuduh; (d) dalam semua pendakwaan untuk pengedaran dadah, fakta yang membuktikan kesalahan adalah dadah berbahaya tersebut, kewujudan yang mana adalah penting untuk satu penghakiman yang membawa keapda sabitan. Atas sebab keseriusan hukuman, ketepatan amaun/kuantiti dadah adalah penting dan membentuk bahagian penting pertuduhan. Dadah berbahaya adalah tidak mudah untuk dikenalpasti. Untuk menentukan komposisi dan sifat, ianya perlu

menjalanai ujian dan analisa saintifik. Dadah berbahaya juga mudah diubah, ditukar atau kontaminasi. Oleh yang demikian satu analisa quantitatif adalah penting; dan (e) adalah merupakan prinsip asas undang-undang jenayah bahawa seorang tertuduh mengetahui dengan yakin kes yang dibuat terhadapnya oleh pendakwaaan, terutamanya amaun/kuantiti dadah dalam satu pertuduhan pengedaran (lihat perenggan 25–32).]

Cases referred to

Commonwealth v Webstar 59 Mass 295 (1850), SC (refd)
Dato' Seri Anwar bin Ibrahim v PP and another appeal [2004] 3 MLJ 405; [2004] 3 CLJ 737, FC (refd)
Federation of Railway Officers' Association v Union of India (2003) 4 SCC 289, SC (refd)
Lt Kol Yusof bin Abdul Rahman v Kol Anuar bin Md Amin & Anor [1997] 1 MLJ 562, CA (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)
Nagappan a/l Kuppusamy v PP [1988] 2 MLJ 53, SC (refd)
Ng Yang Sek v PP [1997] 3 SLR 661; [1997] 2 SLR (R) 816, CA (refd)
Ong Ah Chuan v PP; Koh Chai Cheng v PP [1981] 1 MLJ 64, PC (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705; [2000] 4 CLJ 649, HC (refd)
PP v Hasbi bin M Kusin & Anor [2008] 7 MLJ 331, HC (refd)
R v Dossi (1918) 13 Cr App Rep 158 (refd)
Saravanan Chandaram v PP and another matter [2020] 2 SLR 95, CA (folld)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 9, 9(2), 37(da), 39A(2), 39B(1)(a), First Schedule
Evidence Act 1950
Misuse of Drugs Act [SG]

Hisham Teh Poh Teik (Kee Wei Lon, Mohammad Farhan bin Maaruf, Tania Scivetti, Low Wei Loke and Wan Azwan Aiman Fakhruddin together with him) (Teh Pok Teik & Co) for the appellant.
Samihah bt Rhazali (Aslinda Ahad together with her) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zawawi Salleh FCJ (delivering judgment of the court):

INTRODUCTION

[1] In this appeal, the key issues posed for our determination may be paraphrased as follows:

(a) whether in order to establish a drug trafficking charge under s 39B(1)(a)

of the Dangerous Drugs Act 1952 ('the DDA 1952'), it is incumbent on the prosecution to establish the net weight of the impugned drugs ('first issue');

(b) whether on the factual matrix of the case, the appellant ought to be convicted under s 9 of the DDA 1952 on the grounds that the amount or quantity of the dangerous drugs involved in the offence/offences cannot be quantified or scientifically determined ('second issue'); and

(c) whether the dangerous drugs stated in the first and second charges (Delta–9 charges) were medicinal cannabis and as such cannot be caught within the ambit of DDA 1952 (third issue).

[2] For easy reference, we reproduce the charges thus:

First Charge

Bahawa kamu pada 7 Disember 2015, pada jam lebih kurang 06.45 petang, bertempat di rumah No 50, Jalan Mentari IB/10 Bandar Mahkota, Banting di dalam Daerah Kuala Langat, di dalam Negeri Selangor Darul Ehsan telah didapati memperedarkan dadah berbahaya seberat 3010 milliliter jenis DELTA-9-TETRAHYDROCANNABINOL dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

Second Charge

Bahawa kamu pada 7 Disember 2015, pada jam lebih kurang 06.45 petang, bertempat di rumah No 50, Jalan Mentari 1B/10 Bandar Mahkota, Banting di dalam Daerah Kuala Langat, di dalam Negeri Selangor Darul Ehsan telah didapati memperedarkan dadah berbahaya seberat 1422 gram jenis DELTA-9-TETRAHYDROCANNABINOL dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

Third Charge

Bahawa kamu pada 7 Disember 2015, pada jam lebih kurang 06.45 petang, bertempat di rumah No 50, Jalan Mentari IB/10 Bandar Mahkota, Banting di dalam Daerah Kuala Langat, di dalam Negeri Selangor Darul Ehsan telah didapati memperedarkan dadah berbahaya seberat 279.81 gram jenis Cannabis dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

THE FACTS

[3] The material facts germane to this appeal may be summarised thus. On 7 December 2015, a police team raided a house at No 50, Jalan Mentari 1B/10 Bandar Mahkota, Banting, Kuala Langat, Selangor. In the house, the raiding team found the following items:

(a) in the hall:
Apparatus and paraphernalias for smoking drugs.

(b) under the stair:
Cardboxes contained numerous Pos Laju receipts and packages of caps of vape bottles.

(c) at the kitchen:

(i) two trays filled with 90 bottles (filled with cannabis oil) and the said drugs were on an oven.

(ii) a jar of biscuits, a slow cooker and a box containing oil.

(d) bedroom:

(i) a yellow bag on the mattress; and

(ii) upon inspection of the bedroom, cannabis was found.

(e) middle room
A glass cylinder bottle and boxes of wrapping papers.

[4] The leader of the police team, Insp Mohd Hurairah Alinur bin Mohd Zaid ('SP7'), prepared a search list and marked the items which were seized and handed over the same to the investigating officer ('SP9').

[5] The chemist, Khairul Hadi bin Hj Abdul Raof ('SP6'), conducted chemical analysis of the items which were seized and suspected to be drugs. At the outset, it must be noted that SP6 did not conduct quantitative analysis.

[6] The results of the analysis are as follows:

(a) 'Tumbuhan mampat' marked as AA1:
Cannabis weighing 232g;

(b) 'Ranting bahan tumbuhan' marked as AA2:
Cannabis weighing 13.39g;

(c) plastic bag marked as H13 filled with 'bahan tumbuhan hancur' and oil:
Delta-9-Tetrahydrocannabinol weighing 505.3g;

(d) plastic bag marked as U2:
Delta-9-Tetrahydrocannabinol weighing 375.3g;

(e) plastic bag marked as U1 which consisted of 'bahan tumbuhan hancur':
Delta-9-Tetrahydrocannabinol weighing 460.9g; and

(f) box marked as 'S' which contained plastic container marked as 'S1' filled with 'ranting bahan tumbuhan':

A Cannabis weighing 33.52g.

[7] In his defence, the appellant recalled that on the date stated in the charges, after he had opened the door, the police team entered the house and had inspected every part of the house. The appellant said he did not know that there were drugs in the house.

B

[8] With regard to the items found by the police team at different areas of the house, the appellant said the items were sent by Zainal Hafiz bin Zaini ('SD2'), as SD2 had moved house to Terengganu. SD2 had asked the appellant to fill the oil from the big bottles into smaller bottles as SD2 had no time to do so.

C

[9] The appellant admitted that he knew the oil is cannabis but asserted it was used as medicinal purposes to cure various ailments. The said oil was sold online in the website 'Health-Care'. The appellant presumed such act does not violate any law.

D

[10] The appellant denied the presence of the apparatus or paraphenalias used for smoking cannabis found in the hall of the house. The appellant said, other than the oil, he had no knowledge that the drugs seized by the police team were cannabis.

E

[11] The fact that the appellant had sold 'medicinal cannabis' online via his facebook was confirmed by Muhammad Fakrul Amin bin Mohd Tahir ('SD3'). He testified that he went to the appellant's house to help in the packing of the 'oil' and posting to various customers. However, SD3 claimed that he did not know that the 'oil' contained cannabis.

F

G

[12] In support of his claim that the 'cannabis oil' could be used as medicine, appellant called Taufik bin Salleh ('SD6'), a patient who vouched for the effectiveness of taking cannabis oil for Beta Thalassemia Intermedia and minor ailments.

H

[13] The appellant called an expert, Muhammad Aris bin Mohd Mokles ('SD7') who is a lecturer of Universiti Putra Malaysia to testify that cannabis was acknowledged to have some health benefits in Malaysia. SD7 also disputed the methodology used by the chemist, SP6 in the extraction of the drugs in form of liquid. According to SP7, the methodology used was insufficient and was outdated. According to SP7, SD2 should have used an additional methodology, namely HPL or High Performing Liquid Chromatography which was solvent.

I

ANTECEDENT PROCEEDINGS

[14] At the end of the trial, the learned High Court judge found that the three charges preferred against the appellant were made out and consequently convicted and sentenced him to death.

[15] Being dissatisfied with the decision, the appellant appealed to the Court of Appeal against both convictions and sentences. The Court of Appeal dismissed the appeal in respect of Delta-9 charges (the first and second charges) but allowed the appeal on the cannabis charge (the third charge). The third charge was consequently set aside and substituted for possession of dangerous drugs punishable under s 39A(2) of the DDA 1952. The appellant was sentenced to seven) years imprisonment and ten strokes of the cane.

[16] Undaunted, the appellant appealed to this court against the convictions and sentences in respect of the two Delta-9 charges (the first and second charges).

FINDINGS OF THE COURT OF APPEAL

[17] The relevant parts of the Court of Appeal's reasoning for affirming the High Court's decision are reproduced as hereunder:

(a) failure to establish the net weights of the dangerous drugs in the two charges:

> The failure of the chemist, SP 6 to do any quantitative analysis of the drugs Delta-9-Tetrahydrocannabinol in the first and the second charges is not fatal nor an issue because:
>
> (i) for the first and the second charges, the dangerous drugs are Delta-9-Tetrahydrocannabinol which is listed under the first Schedule, Part III, DDA. There is no requirement under the law that requires the actual weight to be stated for charges of trafficking for such drugs;
>
> (ii) the provisions under sections 37(da), 39A(2) also do not state or lists that Delta-9-Tetrahydrocannabinol to be stipulated as to its weight;
>
> In other words, even possession of 0.01 ml of Delta-9-Tetrahydrocannabinol would be sufficient to attract an offence under the DDA;
>
> (iii) the charges under the first and the second charges against the appellant are offences under section 39B(1)(a) of the DDA. Hence, the elements that needs to be proved, with particular reference to Delta-9-Tetrahydrocannabinol are:
>
> > (a) the drugs seized from the appellant are dangerous drugs as listed in the first Schedule of the DDA;

(b) the dangerous drugs were under custody and control and possession of the appellant; and

(c) the appellant is trafficking in the said drugs.

(iv) in the present case, the learned trial judge found that the prosecution had proved the elements of the offence for the first and the second charges. This can be discerned from the findings of the learned trial judge when he said:

> [22] Berasaskan kepada alasan-alasan di atas saya berpuas hati bahawa satu kes prima facie telah dibuktikan oleh pihak pendakwaan terhadap OKT bagi pertuduhan bagi pertama dan kedua.
>
> ...
>
> [61] Di akhir kes pendakwaan yang lalu Mahkamah ini telah memutuskan satu kes prima facie terhadap OKT mengenai ketiga-tiga pertuduhan. Mengenai pertuduhan pertama dan kedua Mahkamah ini mendapati elemen kawalan dan jagaan OKT ke atas dadah-dadah tersebut adalah di bawah seksyen 2 Akta Dadah Berbahaya 1952 di mana salah satu elemen di dalam seksyen itu telah berjaya dibuktikan oleh pihak pendakwaan iaitu 'Manufacturing'.

(v) once the prosecution had proved the elements of possession and trafficking of the dangerous drugs Delta-9-Tetrahydrocannabinol, the amount or quantity of the same seized is irrelevant. The court is entitled to convict the accused person of DDA 1952 for trafficking.

(b) the dangerous drugs in Delta-9 charges were medicinal cannabis:

(i) we do not find any flaw in such findings by the learned trial judge as there is no supportive evidence from any medical bodies or from the Health Ministry to confirm the contention of the appellant that the drugs possess medicinal properties which is beneficial to the public. The act of the appellant in manufacturing the drugs is subjected to the laws of the country, with particular reference to the DDA. There is no exemption nor license granted to the appellant to possess, manufacture, handle, process or for the sale of the drugs under the DDA or any laws for that matter. There is also no authorisation provided under the DDA or any regulations thereunder which allows the appellant to possess the drugs.

(ii) therefore, the contention by the appellant that the manufacturing of the cannabis was for medicinal purposes for public good, is not caught within the mischief of the DDA, has no merits. There was no error by the learned trial judge in making such findings which warrants our appellate intervention.

OUR ANALYSIS AND FINDINGS

[18] Central to this appeal is the net weight of Delta-9 stated in the first and second charges. The net weight stated in the first charge is 3,010ml of Delta-9.

This is the sum total of the exhibits described as 'H', 'H1', 'H3' and 'H4' (see chemist reports p 91 AR Vol 4). In respect of the second charge, the net weight is said to be 1422 gram of Delta-9 and this is the sum total of the exhibits described as 'H5', 'H11', 'H12' and 'H13.

[19] It is common ground that the chemist ('P6') did not do any quantitative analysis of the exhibits. As we understand it, and simply put, the term 'quantitative analysis' is often used in comparison or contrast with 'qualitative analysis' which seeks information about the identity or form of substance present. For instance, a chemist might be given an unknown solid substance. They will use 'qualitative' techniques to identify the compounds present, and then 'quantitative' techniques to determine the amount of each compound in the sample.

[20] The fact that there was indeed no quantitative analysis is apparent from PW6's testimony during the trial. The relevant parts of PW6's testimony is now reproduced as hereunder:

(a) p 52 AR Vol 3(1):

> S: Daripada analisa kamu sendiri, kamu ada asingkan tak berapa percentage, berapa liter boleh quantify dadah jenis Delta-9-tetrahydrocannabinol daripada minyak-minyak itu?
>
> J: Tidak buat sebab tidak ada keperluan pun untuk quantify kandungannya.

(b) pp 54–55 AR Vol 3(1):

> S: Soalan mengapa saya tanya ada quantify, Delta-9-tetrahydrocannabinol, quantify ataupun tidak. Tujuan saya tanya tadi adalah kerana dalam pertuduhan menyatakan sebagai contoh, 3010 ml memperedarkan dadah berbahaya sebab 3010 ml Delta-9-tetrahydrocannabinol.
>
> Kenapa saya tanya quantify atau tidak, dalam minyak itu saya cadangkan kepada kamu bahawa 100% Delta-9-tetrahydrocannabinol?
>
> J: Betul.
>
> S: Maksudnya ada komposisi lain dalam minyak itu?
>
> J: Ya, Delta-9-tetrahydrocannabinol adalah sebahagian daripada minyak tersebut.
>
> S: So maksudnya is it safe to say, setuju dengan saya kalau saya katakan bahawa dalam kata kita ambil 3010 ml minyak dalam botol tersebut bukannya secara keseluruhannya adalah Delta-9-tetrahydrocannabinol?
>
> J: Saya hanya merujuk kepada Laporan Kimia saya, contohnya H1, ayat terakhir setelah dianalisis saya dapati isipadu bersih cecair tersebut adalah sejumlah 300 ml yang mengandungi Delta-9-tetrahydrocannabinol.
>
> Saya tidak mengatakan bahawa saya dapati isipadu bersih cecalr tersebut

adalah sejumlah 300 ml Delta-9-tetrahydrocannabinol, saya mengatakan yang mengandungi, saya pun tidak tahu berapa banyak kandungannya, saya cuma masukkan dalam laporan saya 'yang mengandungi', bukan bermakna 300 ml Delta-9-tetrahydrocannabinol.

S: Maksudnya bukan keseluruhan 300 ml itu Delta-9-tetrahydrocannabinol?

J: Bukan.

S: Adakah at least the percentage Delta-9-tetrahydrocannabinol boleh didapati ataupun tidak daripada kita ambil contoh 300 ml.

J: Macam mana soalan?

S: Dalam Laporan Kimia dan dirujuk H1, yang dirujuk oleh kamu sebentar tadi, saya cadangkan kepada kamu bahawa dalam sejumlah cecair 300 ml kamu juga tidak dapat menentukan berapa percentage Delta-9-tetrahydrocannabinol pada 300 ml minyak tersebut?

J: Saya tidak dapat, saya tidak buat pun sebab pada saya tidak ada keperluan untuk saya buat ujian quantitation tersebut.

(c) p 57 AR Vol 3(1):

J: ltu adalah isipadu cecair isipadu sebenar cecair yang ada pada eksibit tersebut tapi saya tidak nyatakan kandungan sebenar Delta 9, THC.

(d) p 58 AR Vol 3(1):

S: My question what are the percentage of Delta-9-tetrahydrocannabinol are there in 3010 ml of that point?

J: Analisis itu memang saya tidak buat, untuk Quatitation itu memang tidak buat.

S: Saya cadangkan kepada kamu bahawa kamu tidak menjalankan ujian kuantitatif terhadap barang kes H1, H3, H4 dan H6?

J: Ya, betul.

[21] In his written statement, SP6 said:

p 81 AR Vol 4

Dari analisis ini didapati:

(i) Cecair dalam 'H'(c) iaitu botol kaca 'C', 'H1', 'H3' dan 'H4' mengandungi Delta-9-tetrahydrocannabinol.

(ii) Kek/biskut dalam 'H5' mengandungi Delta-9-tetrahydrocannabinol.

(iii) Bahan tumbuhan hancur dalam 'H11', 'H12' dan 'H13' mengandungi Delta-9-tetrahydrocannabinol.

FIRST AND SECOND ISSUES

[22] Learned counsel for the appellant submitted that the weight or amount of the impugned drugs is an important ingredient of the charge. Learned counsel emphasised that without the amount or weight of the impugned drugs, the prosecution had not proved the first and second charges beyond reasonable doubt and as such the convictions and sentences rendered by the High Court and affirmed by the Court of Appeal cannot be sustained.

[23] In our view, there is force in the submission. The requisites that must be satisfied to sustain conviction for the offence of trafficking in dangerous drugs under s 39B(1)(a) of the DDA 1952 are well settled. The following elements must be established:

(a) the impugned drugs are dangerous drugs as listed in the First Schedule of the DDA 1952;

(b) the impugned drugs are under the custody, control and possession of the appellant; and

(c) the appellant trafficked in the said impugned drugs.

[24] The Court of Appeal opined at (para [52](c)) of the judgment that '[o]nce the prosecution had proved the elements of possession and trafficking of the dangerous drugs Delta-9-Tetrahydrocannabinol, the amount or quantity of the same seized is irrelevant. The court is entitled to convict the accused person under s 39B(1)(a) of the DDA for trafficking'.

[25] With respect, we disagree with the proposition of law above for five reasons. First, looking at the scope and scheme of DDA 1952, it is apparent that the Legislature intended to differentiate as between traffickers and mere addicts. The DDA 1952 provides much less severe penalties for the offences of consumption and possession as compared with punishments prescribed for trafficking.

[26] Second, generally speaking, the amount or quantity of dangerous drugs has bearing in the sentencing process, and it is one of the important factors to be taken into consideration by the prosecution in deciding whether he or she should be charged for trafficking or possession simpliciter. It stands to reason that when someone is found in possession of smaller amount or quantity of dangerous drugs, the logical assumption is that the possession is for personal consumption. By contrast, when someone is found in possession of large or huge amount of dangerous drugs, the logical assumption is that the possession is for the purpose of trafficking. Section 37(da) of the DDA 1952 reflected this legislative policy where it provides that if a person is found with specified

amount or quantity of certain drugs, he or she shall be presumed until the contrary is proved to be trafficking in the said drug. Of course, the prosecution can prove by direct evidence the act of trafficking as defined in s 2 of the DDA 1952. However, without the aid of statutory presumption, the prosecution will face a more difficult task to succeed in proving drug trafficking charge. As stated by Lord Diplock in the seminal Privy Council case of *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64 that apart from the statutory definition of the term 'trafficking', the ordinary meaning of the verb 'traffic' imports the existence of a supplier and a person to whom the goods are to be supplied. Thus, without the aid of statutory presumption, the prosecution caries the legal burden to prove that an accused intended to transfer the impugned drugs to another person in order to succeed to establish trafficking as defined by s 2 of DDA 1952 (see *Public Prosecutor v Hasbi bin M Kusin & Anor* [2008] 7 MLJ 331).

[27] Third, well-entrenched in jurisprudence is the principle that the burden is on the prosecution to prove beyond reasonable doubt of every essential fact necessary to constitute the crime with which he or she is charged (see *Nagappan a/l Kuppusamy v Public Prosecutor* [1988] 2 MLJ 53). This principle is a corner stone in our criminal law. The prosecution must rely on the strength of its own evidence and not relying on the weakness of the defence (see *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649). The concept of reasonable doubt though not defined in the Evidence Act 1950, has been interpreted through various judicial decisions. In *Commonwealth v Webstar* 59 Mass 295 (1850), the court opined that reasonable doubt is not meant to be comprehended as a mere possible doubt (as all that is connected to the affairs of humans can be said to contain a possible element of doubt). Reasonable doubt is the state of mind of the jurors wherein they are not in a position to confirm the veracity of the guilt of the accused even after careful perusal of all the adduced evidence. In *Lt Kol Yusof bin Abdul Rahman v Kol Anuar bin Md Amin & Anor* [1997] 1 MLJ 562 (CA), Mahadev Shankar JCA said (at p 573):

> In view of this definition the best explanation of 'reasonable doubt' is perhaps that given by Denning J in *Miller v Minister of Pensions* [1947] 2 All ER 372 where he said (at p 373):
>
> > (The degree of cogency) ... need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to defect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that what will suffice' (see also *Tang Kin Seng v Public Prosecutor* [1997] 1 SLR 46 (HC)).

[28] Further, it is beyond argument that the amount or quantity of dangerous drugs as specified in the Delta-9 charges (the first and second charges) is an essential part of the alleged offence. In the case of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2004] 3 MLJ 405; [2004] 3 CLJ 737, one of the issues canvassed was whether the 'date' of the commission of the offence was material and consequently whether the charges were proved. The court referred to Atkin J's judgment in *R v Dossi* (1918) 13 Cr App Rep 158 where His Lordship said:

> From time immemorial a date specified in an indictment has never been material unless it is actually an essential part of the alleged offence.

[29] Likewise in the present case. The weight or quantity of the impugned drugs is an important and essential ingredient of the charge. It represents the core of the prosecution's case. The appellant cannot be penalized for omission or the failure by chemist to carry out the quantitative analysis.

[30] We are unable to comprehend the reason as to why SP6 did not do any quantitative analysis of the exhibits, and as such cannot confirm its weight or quantity. The evidence on record revealed that the investigating officer had requested the chemist to determine the nature of the drugs and the net weight of the impugned drugs (see p 85 AR Vol 4 (Pol 3 — ex P58). Under para 5, the investigating officer requested:

> *Bagi menentukan jenis dadah dan berat bersihnya.* (Emphasis added.)

SP6 did not say that quantitative analysis could not be done. In fact, he said he did not do so (see pp 54–55 AR Vol 3(1)).

[31] Fourth, in all prosecutions for drug trafficking, the corpus delict is the dangerous drug itself, the existence of which is essential to a judgment of conviction. Because of the seriousness of the penalty, the certainty of the amount or quantity of the impugned drug is very important and formed an essential part of the charge. Further, dangerous drugs are not readily identifiable. To determine their composition and nature, they must undergo scientific testing and analysis. Dangerous drugs are also highly susceptible to alteration, tampering or contamination. Therefore, a quantitative analysis is essential.

[32] Fifth, it is a fundamental principle of our criminal law that an accused should know with certainty the case advanced against him by the prosecution, especially the amount or quantity of the impugned drugs in a trafficking charge. In this regard, we refer to Singapore case of *Saravanan Chandaram v Public Prosecutor and another matter* [2020] 2 SLR 95. The accused in that case was charged, inter alia, for importing into Singapore ten bundles containing not less than 3,295.7g of fragmented vegetable matter which was analysed and

found to contain (CBN) and (THC), an offence under the Misuse of Drugs Act. This charge was described as the cannabis mixture charge. He was convicted by the High Court. One of the reasons the Court of Appeal set aside the conviction on the cannabis mixture charge was that the weight could not be determined. This is what the learned Chief Justice of Singapore said:

> 187. This is significantly compounded by the problem of the indeterminacy of the quantity of the Created Fragmented Vegetable Matter. It is impossible to ascertain accurately the quantity of vegetable fragments that were created as a result of the HSA's testing procedure and the quantity of vegetable fragments that were already present in the ten bundles when the Appellant brought them into Singapore. Any estimate of the quantities of cannabis and cannabis mixture at the time of the offence extrapolated from their respective quantities after the HSA's testing would inevitably be arbitrary.
>
> 188. For both these reasons, we are satisfied that the Importation of cannabis mixture charge cannot be established.
>
> 191 In our judgment, these submissions by the Prosecution do not address the two points we have highlighted at [186]–[187] above. Charges cannot be brought on the basis of approximations. In order to establish a drug importation charge, it is incumbent on the Prosecution to prove that the accused person knew the nature of the drugs in question, and to establish accurately the relevant drug involved at the time of the offence. These are difficulties that the Prosecution cannot surmount where the drugs in question consist of cannabis-related plant material containing both cannabis and cannabis mixture, and they affect the Dual Charging Practice generally, and in this case specifically, the Importation of cannabis mixture charge.

[33] We agree and endorse the sentiments expressed by learned Chief Justice of Singapore. We hasten to add that where the stakes are high (death penalty), some precision is called for. Without quantitative analysis of the impugned drugs carried out by SP6 and with no other evidence as to the amount or quantity of the impugned drugs on the record to justify the amount or quantity of Delta-9 stated in the first and second charges, the prosecution had failed to establish the case against appellant beyond reasonable doubt.

[34] In conclusion, we hold that the appellant cannot be convicted for drug trafficking charges where the amount or quantity of dangerous drugs stated in the charges cannot be quantified or scientifically determined.

[35] In the circumstances, we agree with the alternative submission of learned counsel for the appellant that at its highest the appellant ought to be convicted under s 9 of the DDA 1952.

THIRD ISSUE

[36] Learned counsel for the appellant submitted that on 2 December 2020, the majority of the Member States of the United Nation's Commission on

Narcotic Drugs agreed to remove cannabis and its derivatives from Schedule IV of the Single Convention on Narcotic Drugs. The lift on the six decades prohibition was to recognise and explore the drug's medicinal and therapeutic potential in line with the recommendations by the World Health Organisation (WHO). The WHO recognised the medical potential of cannabis.

[37] Learned counsel further submitted that the evidence on record revealed that the appellant was selling medical online to help cure the patients who have suffering from various kinds of ailments.

[38] Learned counsel posited that the conduct of the appellant was not caught within the DDA 1952 and 'the appellant's conduct should not attract disapprobation that is reserved for the drug dealers who exploit the vulnerability of addicts and who spread the poison of narcotic addiction in society' (citing the passage in *Ng Yang Sek v Public Prosecutor* [1997] 3 SLR 661; [1997] 2 SLR (R) 816).

[39] We are made to understand that there are proposals and reforms to the status and authorisation of cannabis by the previous government (Pakatan Harapan Government which formed the government for 22 months from May 2018 to February 2020). According to the then Minister of Health, Dr Dzulkefly Ahmad, any changes to the law would have to refer to the Attorney General's Chambers (see https://www.thestar.com.my, dated 19 September 2018). The Minister said the Cabinet had discussed the matter but did not reach any decision (see https://m.malaysiakini.com.my, dated 21 September 2021).

[40] On 18 February, 2021, Prime Minister Tan Sri Muhyiddin Yassin said that the government will maintain its current stance on cannabis and all drug-related substances as enforced by DDA 1952. He said these substances had clearly brought much harm to society, this despite the 63rd Session of the Commission on Narcotic Drugs held in Vienna in 2021 voting to remove cannabis and cannabis resin from its Schedule IV of the 1961 Single Convention on Narcotic Drugs 1961 (see https://www.malaymail.com.my, dated 18 February 2021).

[41] As the law stands now, cannabis is a controlled drug under the first Schedule of DDA 1952 and in accordance with the provisions of that Act, the Minister charged with the responsibility for medical and health ('the Minister of Health') may authorise the cultivation of cannabis for medicinal purposes, however to date, no such authorisation has been granted.

[42] The primary authority with jurisdiction over cannabinoid drugs is the National Pharmaceutical Regulatory Agency ('NPRA') established under the

Ministry of Health. We are not aware of any list of doctors or persons who are authorised to prescribe cannabinoid drugs.

[43] To the best of our knowledge, currently there was no substantial research in Malaysia showing that cannabis oil has proven to cure any patients who have suffering from any kinds of ailments.

[44] The government stance is to maintain the current status on cannabis and all drug-related substances as provided in the DDA 1952. This is a government policy. It is settled law that the court function is not to assess the wisdom of government policy unless they are found to be in contravention of the Federal Constitution and/or the laws (see *Federation of Railway Officers' Association v Union of India* (2003) 4 SCC 289).

[45] We agree with the decisions reached by the High Court and the Court of Appeal that the act of the appellant is subjected to the provisions of DDA 1952. There is no authorisation granted to the appellant to possess, manufacture, handle, process or for the sale of the impugned drugs for medicinal purposes.

[46] In the premises, the conduct of the appellant is caught within the ambit of DDA 1952.

[47] In the light of our decisions on issues 1 and 2, we allowed the appeal in respect of Delta-9 charges (the first and second charges) and set aside the convictions and sentences rendered by the Court of Appeal and substituted convictions for offences of possession under s 9 of the DDA 1952 punishable under s 9(2) of the same Act.

[48] After considering the mitigating factors advanced by learned counsel and the aggravating factors submitted by learned deputy public prosecutor, we sentenced the appellant imprisonment for five years with effect from the date of his arrest (7 December 2015) for each of the charges. Both sentences to run concurrently.

Order accordingly.

Reported by Ashok Kumar